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COMMENTS OF ACA INTERNATIONAL ON INTERAGENCY NOTICE OF PROPOSED RULEMAKING: PROCEDURES TO ENHANCE THE ACCURACY AND INTEGRITY OF INFORMATION FURNISHED TO CONSUMER REPORTING AGENCIES UNDER SECTION 312 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT

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I. Introduction.

The following comments are submitted on behalf of ACA International ("ACA") in response to the Interagency Notice of Proposed Rulemaking: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act.[1] ACA's comments respond to requests from the six administrative agencies jointly issuing the proposed rule, including the Federal Trade Commission (collectively, "Agencies").

The Fair Credit Reporting Act[2] was extensively amended in 2003 by the Fair and Accurate Credit Transactions Act ("FACT Act").[3] Prior to the amendments, furnishers of consumer data were prohibited from providing to consumer reporting agencies information that they knew, or consciously avoided knowing, was inaccurate.[4] The FACT Act raised the standards applicable to furnishers for identifying inaccurate data,[5] and prescribed the development of regulations establishing guidelines for furnishers to follow when reporting

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1 72 Fed. Reg. 70944 *et seq.* (December 13, 2007).

2 15 U.S.C. § 1681-1681x.

3 Fair and Accurate Credit Transactions Act, Pub. L. 108-159, 117 Stat. 1952.

4 Section 623(a)(1)(A); 15 U.S.C. § 1681s-2(a)(1)(A). The FCRA, prior to its amendment in 2003, provided consumers a broad array of other protections by imposing obligations on furnishers to correct and update accounts, accurately record notices of disputes, and report delinquency dates to consumer reporting agencies. *See* Section 623(a); 15 U.S.C. § 1681s-2(a).

5 Section 623(a)(1)(A); 15 U.S.C. § 1681s-2(a)(1)(A) (deleting conscious avoidance standard and adopting "reasonable cause to believe" standard).

consumer data.[6]

ACA members welcome the Agency's proposed rule to implement the accuracy guidelines.[7] The guidelines will define the future ability of data furnishers, many of whom are members of ACA, to report consumer data to consumer reporting agencies. Guidelines that are too restrictive may deter reporting, either due to the difficulties of implementing the requirements or as a way for data furnishers to minimize business risk. At the same time, guidelines that are ambiguous create a risk of reporting inaccuracies.

A brief illustration demonstrates this point. A consumer now can record a *written* dispute of the accuracy of information on his or her report by directly contacting a data furnisher. Previously these disputes were routed to consumer reporting agencies. In practical application, it is frequently unclear whether the disputing consumer is registering a dispute about the accuracy of data in a tradeline placed by the data furnisher, and if so, the specific information in question. It frequently is not clear whether the consumer is disputing the debt itself, as he or she is entitled to do pursuant to a separate federal statute applicable to many data furnishers, the Fair Debt Collection Practices Act (FDCPA). The FDCPA, as construed by the courts, requires data furnishers to process and react to consumer disputes whether

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6 Section 623(e); 15 U.S.C. § 1681s-2(e).

7 Guidance to data furnishers on compliance with the new FCRA requirements particularly is needed in light of the fact that the FTC, as the primary Federal regulatory of many ACA members, has discontinued its long history of issuing informal guidance in the form of staff opinion letters interpreting the FCRA.

communicated in writing or *orally*.[8] When played out across literally billions of tradeline transactions and millions of consumer disputes, the intersection of the FDCPA's preference for oral and written disputes, and the FACT Act's requirement for written accuracy disputes, results in data furnishers reporting *all consumer communications as disputes* lest the furnisher misconstrue the intent of the consumer and be subjected to liability. This is counterproductive to the intent of Congress to increase the accuracy of information on consumer reports, with far-reaching implications on credit scoring, evaluation of credit risk, and the general accuracy of consumer information.

Perhaps the single most important issue for the Agencies charged with the promulgation of the new accuracy guidelines is how the diversity of data furnishers can be accommodated without deterring reporting or unintentionally degrading accuracy. Data furnishers are not defined by statute, and they defy easy classification.[9] They are heterogeneous. They include, for example, credit grantors reporting their own transactions and experiences with their customers, third-party debt collectors acting as agents of credit grantors, attorneys, and companies that acquire accounts either from credit grantors or collectors.

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8 *Brady v. Credit Recovery Co.*, 160 F.3d 64 (1st Cir. 1998) (violation of the FDCPA by failing to include a consumer's oral dispute of the debt in the consumer's report furnished to consumer reporting agencies); *Young v. Credit Bureau Inc.*, 729 F. Supp. 1421 (W.D.N.Y. 1989) (FDCPA does not require that a consumer, in order to dispute the validity of a debt, convey that information in writing).

9 *See generally Carney v. Experian Info. Solutions, Inc.*, 57 F. Supp. 2d 496, 501 (W.D. Tenn. 1999) (defining data furnishers as entities reporting a specific debt owed by a specific consumer).

Private and public companies furnish data, as do Federal and State administrative agencies. Indeed, the Federal government may be one of the largest data furnishers to consumer reporting agencies based on the statutory requirement that all Federal delinquent debts be reported.[10]

Data furnishers are not defined by company size or the tradelines reported. Furnishers include the largest of companies with thousands of employees to the smallest of companies with only a few. Nor is there uniformity in the types of accounts reported: secured and unsecured loans, mortgages, federal and state tax assessments, utilities, medical bills, public and private educational debts, and administrative fines and penalties are but a few examples. Individual consumer accounts, as well as business accounts, are reported. Each account hosts a unique transactional history. No two accurate tradelines are the same.

Amid this diversity, the Agencies have a formidable task of developing policies and procedures of general applicability. As discussed below, ACA believes that the final regulations that the Agencies implement should include the following:

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10 The Debt Collection Improvements Act of 1996 requires all Federal delinquent consumer debts to be reported to consumer reporting agencies. As such, the Federal government regularly furnishes massive amounts of information to consumer reporting agencies concerning debts owed to the government, including the six administrative agencies issuing the ANPR. *See* Guide to the Federal Credit Bureau Program, *available at* http://www.fms.treas.gov/fedreg guidance/fedcreditbureauguide.pdf, at preface ("The use of nationally recognized credit reporting agencies . . . is an inexpensive tool that can assist Federal agencies to improve their credit management and debt collection programs. While only one of several tools available, increased credit bureau reporting and increased Federal agency use of credit reporting agencies is designated as a 'high priority' by the Office of Management and Budget (OMB), the Treasury Department's Financial Management Service (FMS), and the Federal Credit Policy Working Group").

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- The final rule should adopt the Guidelines Definition Approach to accuracy and integrity. The Regulatory Definition Approach is incompatible with the Agencies' statutory mandate.
- The Agencies should promulgate minimum data elements (e.g., full name, address, date of birth, social security number, telephone number, account number, creditor information) required to furnish information under the new accuracy and integrity definitions. The data elements should account for the realistic compliance capabilities of small businesses, as well as providing for a reasonable procedures defense for furnishers.
- The regulations should clarify that debt collectors are entitled to rely on the data provided by their creditor clients when furnishing information and, more specifically, collectors need not maintain possession, custody and control over the creditor records in order to report under the Guidelines Definition Approach.
- To avoid a statutory conflict between the FDCPA and FACT Act, the regulation should clarify that the act of responding to a consumer dispute is not an attempt to collect a debt under the FDCPA. Further the regulation should clarify that a consumer that sends a written dispute to a furnisher *after* having invoked his or her cease communication rights under the FDCPA has revoked

his or cease communication instruction for purposes of communicating with the furnisher to process the dispute.

- In order to increase the accuracy and integrity of accounts sold to asset purchasers, the banking Agencies should consider requiring (a) financial institutions under the authority of the banking Agencies to retain and update customer records.

II. Background On ACA International.

ACA International is an international trade organization originally formed in 1939 and composed of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 6,000 members based in more than 55 countries and ranging from credit grantors, third-party collection agencies, attorneys, and vendor affiliates. ACA has numerous divisions or sections accommodating the specific compliance and regulatory issues of its members' business practices.

The company-members of ACA are subject to applicable Federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activity of ACA members is regulated primarily by the Commission under the Federal Trade Commission Act, 15 U.S.C. § 45 et seq., the FDCPA, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the Gramm-Leach-Bliley Act, 15

U.S.C. § 6801 et seq., in addition to numerous other Federal and state laws. Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering payments. In so doing, Congress primarily committed the Federal enforcement of the recovery of debts to Commission.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city or state, and the very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than ten employees, and more than 2,500 of the members employ fewer than twenty persons.

Whether creditors, asset buyers or sellers, or third-party debt collectors, ACA members regularly furnish an incalculable amount of consumer information to consumer reporting agencies under the FCRA. In most instances, this information is furnished to consumer reporting agencies electronically using the automated Metro 2 Format developed and accepted by the nationwide consumer reporting agencies.[11] The reporting by data furnishers is based on contracts with the nationwide consumer reporting agencies. The Metro 2 Format instructs data

11 The reporting procedures followed by data furnishers when providing data to smaller or specialty

furnishers as to the mechanics of organizing and transmitting data to the consumer reporting agencies. Record layouts, file formats, and status codes of the consumer data, for example, are defined by the nationwide consumer reporting agencies. As discussed *infra*, data furnishers sometimes report that the procedures imposed by consumer reporting agencies to furnish and update tradelines are inconsistent, which can affect the transmission of data and the accuracy of the tradelines.

Data furnishers commonly report consumer tradelines in an aggregated or "batch" format. The files are sent to the consumer reporting agencies electronically, and the agencies review and upload the data. Data furnishers thereafter will submit monthly updates to the consumer reporting agencies to reflect the transactional experiences occurring during the month, for example, payments received or consumer disputes.

As a trade association, ACA serves members and represents the industry by developing timely information based on sound research and disseminating it through innovative education, training, and communications. The Association also promotes professional and ethical conduct in the global marketplace; acts as the members' voice in critical business, legislative, legal, regulatory and public arenas; and provides quality products and services to its members.

To help members stay current on regulatory and business developments, as well as industry practices, ACA provides more than 130 educational and training workshops to its

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consumer reporting agencies are less standardized. Further, some data furnishers still use the Metro 1 Format.

members each year, with nearly 1,000 industry professionals completing ACA's collector credentialing program annually. In addition, ACA has a Code of Ethics and Code of Operations (Ethics Code). Upon becoming a member of ACA and as a condition of membership renewal, each member agrees to abide by the Association's Ethics Code. In addition, ACA members must comply with all Federal and state laws and regulations governing the credit and collection industry. In fact, ACA's commitment to compliance is reflected in the fact that consumers are encouraged to file complaints with ACA. If a complaint is filed regarding an ACA member, ACA investigates the complaint and, if it finds that a member company has violated the Association's standards and ethics guidelines, it will impose sanctions ranging from a private letter of admonition to suspension to expulsion.

ACA's five core values are:

1. Respect – for diverse customers, clients, colleagues and the global workforce.

2. Leadership – by uniting members to advance a successful, service–oriented and professional credit and collection industry.

3. Service – by providing quality products and services to members while meeting the highest professional standards.

4. Innovation – by exploring new ways to achieve excellence.

5. Fiscal Responsibility – by operating the Association in a prudent manner

while creating and maintaining a financial reserve to meet future member needs.

III. ACA Members Are A Critical Part Of The Economy.

The credit and collections industry in general, and ACA members in specific, play a crucial role in safeguarding the health of the economy. Uncollected consumer debt threatens an already vulnerable domestic economy. According to a 2006 economic impact study of the collections industry conducted by PricewaterhouseCoopers LLP, third party collection agencies returned $39.3 billion to creditors measured on a commission basis in 2005. This represents a savings of $351 per household each year, which equates to 155 gallons of gasoline or 129 days of electricity payments attributed to households.

By itself, outstanding credit card debt has doubled in the past decade and now exceeds one trillion dollars. Total consumer debt, including home mortgages, exceeds $9 trillion. Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of practically every community's businesses. For example, ACA members represent the local hardware store, the retailer down the street, and the local physician. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers.

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ACA members also partner with Federal, state, and local governments to assist in the recovery of public debts. Each year, Federal agencies refer billions of non-tax debts to the Department of Treasury's Financial Management Service (FMS) pursuant to the Debt Collection Improvement Act of 1996. FMS is responsible for "improv[ing] the quality of the [F]ederal government's financial management by increasing the collection of delinquent debt owed to the government, by providing debt management services to all federal agencies, and by protecting the financial interests of the American taxpayer." According to FMS, "the FMS debt collection program is a central tool for sound financial management at the Federal level. Since 1996, FMS has collected more than $24.4 billion in delinquent debt. In fiscal year 2005, collections of [F]ederal delinquent debt remained at a constant $3 billion."

The importance of collections industry also is reflected in other Federal and state initiatives involving alliances between industry and government. For example, the Internal Revenue Service has implemented a program, authorized by the Executive Office of the President, to utilize debt collectors to supplement recovery efforts on approximately $120 billion in unpaid Federal income taxes. In addition, ACA members are essential to the recovery programs of the Department of Education and state analogs. Comments from interested parties concerning the importance of student loan recovery programs will be submitted to the Commission separately.

Without an effective collection process, the economic viability of these businesses, as well as public debt recovery programs, is threatened. At the very least, Americans would be forced to pay higher prices to compensate for uncollected debt.

IV. Statutory Overview.

The FACT Act amended section 623 of the FCRA in two ways. First, it added a new subsection (e) to section 623 requiring the Agencies to create accuracy guidelines for data furnishers. The Agencies are required to:

> (A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and
>
> (B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).[12]

To develop the accuracy guidelines prescribed in section 623(e)(1)(A), the Agencies are to evaluate four subjects:

> (1) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

12 Section 623(e)(1); 15 U.S.C. § 1681s-2(e)(1).

(2) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

(3) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to assure the accuracy and integrity of information furnished to consumer reporting agencies; and

(4) examine the policies and procedures that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.[13]

Second, the FACT Act added a new subsection (8) to section 623(a) which allows consumers to dispute the accuracy of information on a consumer report in writing directly to the data furnisher that reported the information.[14] A written dispute notice must be submitted by the consumer.[15] The written dispute notice must identify the specific information disputed, explain the basis for the dispute, and include all supporting documentation required by the data furnisher to substantiate the basis of the dispute.[16] The furnisher must conduct a reasonable investigation of the disputed information, review the substantiation provided by the consumer,

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13 Section 623(e)(3); 15 U.S.C. § 1681s-2(e)(3). As discussed, *infra*, the FACT Act limits liability for possible violations of the requirements of section 623(e) to government enforcement, similar to the enforcement of section 623(a). *See* Section 623(c)(2); 15 U.S.C. § 1681s-2(c)(2).

14 Section 623(a)(8); 15 U.S.C. § 1681s-2(a)(8). Previously consumers contacted consumer reporting agencies about the accuracy of information contained in a tradeline placed by a data furnisher. The agencies then notified data furnishers of the consumers' disputes, investigated, and reported back to the agencies.

15 Section 623(a)(8)(D); 15 U.S.C. § 1681s-2(a)(8)(D).

16 *Id.*

timely report the results to the consumer reporting agencies, and correct the information if inaccurate.[17] Frivolous or irrelevant disputes do not require a data furnisher to investigate, including disputes that fail to provide sufficient information to investigate and disputes that are substantially the same as matters previously disputed by the consumer either with the furnisher or through consumer reporting agencies.[18]

To evaluate the reinvestigation obligations of furnishers, the Agencies are required to weigh the following four factors when prescribing regulations:

(1) the benefits to consumers with the costs on furnishers and the credit reporting system;

(2) the impact on the overall accuracy and integrity of consumer reports of any such requirements;

(3) whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of any such dispute; and

(4) the potential impact on the credit reporting process if credit repair organizations . . . are able to circumvent the prohibition in subparagraph (G).[19]

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17 Section 623(a)(8)(E); 15 U.S.C. § 1681s-2(a)(8)(E).

18 Section 623(a)(8)(F); 15 U.S.C. § 1681s-2(a)(8)(F). A notice of determination must be sent to the consumer within five days of making the determination that the dispute is frivolous or irrelevant. *See* Section 623(a)(8)(F)(ii); 15 U.S.C. § 1681s-2(a)(8)(F)(ii).

19 Section 623(a)(8)(B); 15 U.S.C. § 1681s-2(a)(8)(B).

V. Comments Regarding The Proposed Rule.

A. The Agencies Should Adopt the Guidelines Definition Approach.

The FACT Act does not define the terms "accuracy" and "integrity." The Agencies have proposed two different approaches with dramatically different impacts on furnisher obligations. The Regulatory and Guidelines Definition Approach each share a common definition of "accuracy". However, the placement of the definition would be in the rule under the Regulatory Definition Approach and in the guideline under the Guideline Definition Approach.[20]

More significantly, the term "integrity" would be defined differently. In the Regulatory Definition context, "integrity" would be defined in the rule as "any information that a furnisher provides to a CRA about an account or other relationship with the consumer does not omit any term, such as credit limit or opening date, of that account or other relationship, the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report or a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."[21] In contrast, the same term in

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20 "Accuracy" would be defined as "any information that a furnisher provides to a CRA about an account or other relationship with the consumer reflects without error the terms of and liability for the account or other relationship and the consumer's performance or other conduct with respect to the account or other relationship."

21 Proposed § __.41(b).

the Guidelines Definition approach would be defined in the guidelines (not the rule) as "any information that a furnisher provides to a CRA about an account or other relationship with the consumer: (1) Is reported in a form and manner that is designed to minimize the likelihood that the information, although accurate, may be erroneously reflected in the consumer report; and (2) should be substantiated by the furnisher's own records."

The difference in the two definitions is substantial. Technically accurate information that lacks "integrity" because it omits a data element would be law violation under the Regulatory Definition Approach. The Agencies' example in this regard is an omitted credit limit on a revolving credit account. All of the information in the tradeline may be accurate, but the omitted credit limit makes the tradeline without integrity and subject to enforcement as a law violation. The underlying premise of the Regulatory Definition Approach is that information reported to CRAs must satisfy a "conformity to fact" standard, not simply conformity to the data furnisher's records.[22] In contrast, the Guidelines Definition Approach would not impose liability on data furnishers for reporting accurate information, but which otherwise lacks one or more data elements that may have a bearing on a consumer's creditworthiness.

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22 "Conformity to fact", according to some commenters, requires furnishers to possess and rely upon the original documentation that created the reportable event, for example, the hospital bill, telephone bill, credit card agreement, or mortgage documents. The absence of this information would undermine the integrity of the tradeline.

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ACA respectfully submits the Agencies should adopt the Guidelines Definition Approach. Several reasons support this outcome. First, nothing in the amended FCRA reveals a Congressional intention that accurate information reported by data furnishers would create a legal liability under the amended FCRA because of a single missing data element that may, or may not, affect creditworthiness. Indeed, the legislative history indicates that Congress intended to uncouple the concept of "completeness" from "integrity." For example, Chairman Michael Oxley stated in the Congressional record that "'[a]ccuracy and integrity' was selected [by the Congress] as the relevant standard rather than 'accuracy and completeness' as used in Sections 313 and 319, to focus on the quality of the information furnished rather than the completeness of the information furnished."[23] The Regulatory Definition Approach would therefore impose a standard for integrity that has no support in the statutory text or accompanying legislative history.

Second, the statutory preference for furnisher "guidelines", as opposed to regulations, reveals a Congressional intention for data furnisher flexibility when establishing reasonable procedures to implement the accuracy guidelines adopted by the Agencies. Congress plainly bifurcated the statutory scheme so that the specific guidelines adopted by furnishers are not created by regulation. Instead, what is subject to regulation is the implementation of the data furnisher's reasonable policies and procedures effectuating the guidelines. This fact is

23 149 Cong. Rec. E2512, E2516 (Nov. 4, 2003).

reflected in the structure of the statute, which requires the Agencies to:

> (A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and
>
> (B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).[24]

To construe the statute as permitting regulations defining accuracy and integrity in a manner than equates "integrity" with "completeness", as is the case under the Regulatory Definition Approach, would be arbitrary and capricious. Such a interpretation would not be entitled to *Chevron* deference because the statute is not ambiguous on the critical point that Congress did not intend to adopt a standard of conformity to fact when furnishing data. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The flexibility urged by ACA and embedded in the amended FCRA also is consistent with the approach mandated by Congress with regard to other consumer financial-oriented statutes, for example, the Safeguards Rule component of the Gramm-Leach-Bliley Act.[25] The GLB Act required the FTC to establish standards that "safeguard" the security and confidentiality of customer records and information, to protect against any anticipated threats

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24 Section 623(e)(1); 15 U.S.C. § 1681s-2(e)(1).

25 Standards for Safeguarding Consumer Information, Final Rule, 67 Fed. Reg. 36484 (May 23, 2002).

or hazards to the security or integrity of such records, and to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.[26] The standards adopted by the FTC are flexible to the company's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information it handles. The FTC emphasized that the "Final Rule strikes an appropriate balance between allowing flexibility to financial institutions and establishing standards for safeguarding customer information that are consistent with the Act's goals."[27] In summary, there is little question that flexible guidelines, as opposed to rigid regulations, can faithfully carry out the Congressional mandate.

Third, ACA notes that the Regulatory Definition Approach, if promulgated, has the potential to do more harm that good to the credit reporting system. Credit reporting is a voluntary action. Although voluntary, the accuracy and completeness of credit information is advanced when there is maximum participation in the system. Diminished participation by data furnishers because of concerns with heightened exposure to liability for reporting admittedly accurate information means that consumer reports would be less robust, less reliable, and less predictive of creditworthiness decisions.

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26 15 U.S.C. § 6801(b).

27 67 Fed. Reg. at 36484 col. 3.

Here, the Regulatory Definition Approach's "all-or-nothing" underpinning would discourage data furnishers from reporting information that is without question accurate, but is missing one or more data elements. This will result in fewer data furnishers reporting accurate information in order to minimize the risk of liability. The practical implications of this reporting disincentive are readily apparent. Assume a trade line that has accurate information, including address, city, state, zip code, creditor name, date opened, date closed, data of first delinquency, balance, etc., but the tradeline is missing a middle initial or has an abbreviated name or has truncated some of the Metro 2 Format data. Although ACA is unaware of industry statistics indicating the number of trade lines that have less than complete information but nevertheless accurate data, experience suggests that a data element on tradelines may be missing, truncated, or transposed (in the case of numeric identifiers) from time to time. This missing, truncated, or transposed information does not affect the accuracy of the reported information, but it may nevertheless result in liability under the Regulatory Definition Approach if it is asserted that the data was "critical" and could result in a misleading portrayal of the consumers account. Even worse, it may result in liability if the data furnisher reported accurate information but without the "original documents such as credit agreements."[28] The result is that fewer data funishers will report accurate information. This is an outcome that Congress did not intend and, if implemented in the regulation, it will deter data furnishers from

28 72 Fed. Reg. at 70949, col. 2.

voluntarily reporting.

For these reasons, ACA submits that the Agencies should reject the Regulatory Definition Approach as inconsistent with the statutory mandate, and instead adopt the Guidelines Definition Approach.

B. The Agencies Should Articulate Minimum Guidelines for Reporting.

The Agencies should identify minimum guidelines necessary to satisfy the accuracy and integrity standards. Minimum guidelines are required because of the heterogeneous characteristics of data furnishers and the need for flexibility, as discussed above. They also are required due to the complexities of furnishing data to a multitude of different nationwide and specialty consumer reporting agencies with inconsistent or differing reporting procedures and the variations in information collected and retained by credit grantors.

In this regard, ACA believes the Agencies should articulate minimum data elements that may be furnished in order to be in compliance with the new accuracy and integrity definitions. A data furnisher may report a wide variety of record information in the Metro 2 Format including, for example: first name, middle name, surname, first line of address, second line address, city, state, postal/zip code, residence code, date of birth, social security number, telephone number, account number, creditor information, portfolio type, account type, date opened, date of last payment, account status, payment rating, payment history profile, current balance, amount past due, original charge-off amount, billing date, original creditor name,

mortgage identification number, and employer name and information. Some or all of this information may be made available to a data furnisher from the creditor in a collection context. Not all of this information is necessary or critical in each case to report accurately and without reducing the integrity of the information under the Guidelines Definition Approach or otherwise diminishing the creditworthiness of the consumer. The proposed rule offers little specific guidance to data furnishers to assist them in developing the reasonable policies and procedures to identify which of these data elements are "critical"[29] such that the absence of the data would result in a report lacking integrity.

ACA suggests that one approach is that certain minimum data should be deemed critical to report to the CRA. For example, a combination of three of any of the following data elements should be reported as minimum information including: name (first and last), personal identification number (social security number or drivers license identification), date of birth, current address, along with current billing information. However, missing information beyond the scope of the minimum data should not be deemed "critical" such that there is an integrity violation if it is not reported.

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29 72 Fed. Reg. at 70950 col. 1-2 (stating that under the Regulatory Definitions Approach, omitted "critical" information would violate the integrity standard because it presents a misleading credit picture).

C. The Accuracy Guidelines Should Provide Data Furnishers A Reasonable Procedures Defense.

The Agencies are required to establish guidelines for use by data furnishers regarding the accuracy of consumer information, and to create regulations requiring data furnishers to implement the accuracy guidelines through reasonable policies and procedures. A data furnisher that complies with the accuracy guidelines and implements reasonable policies and procedures should be entitled to a presumption of statutory compliance and a defense to enforcement.

An example of this presumption can be found in the FDCPA's bona fide error or "reasonable procedures" defense. The FDCPA is a strict liability statute. However, data furnishers that are debt collectors are entitled to a reasonable procedures defense. A debt collector cannot be held liable in any action in which it demonstrates by a preponderance of evidence that an alleged violation was not intentional and "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error."[30] Courts have applied the FDCPA's reasonable procedure's defense to alleged violations by data furnishers subject to the statute.[31] ACA requests that the Agencies address this issue in the final rule.

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30 Section 813(c); 15 U.S.C. §1692k(c).

31 *See, e.g., Heintz v. Jenkins*, 514 U.S. 291 (1995); *Hyman v. Tate*, 362 F.3d 965 (7th Cir. 2004); *Juras v. Aman Collection Serv. Inc.*, 829 F.2d 739 (9th Cir. 1987); *Jenkins v. Union Corp.*, 999 F. Supp. 1120 (N.D. Ill.

D. Debt Collector Furnishers Are Entitled to Rely on Creditor Information.

The regulations should clarify that debt collectors are entitled to rely on the data provided by their creditor clients when furnishing information and, more specifically, collectors need not maintain possession, custody and control over the creditor records in order to report under the Guidelines Definition Approach. This arises in the context of the "integrity" definition under the Guideline Definition Approach which would require the furnisher's own records to sustain the information reported.

Data furnishers collecting debts on behalf of credit grantors can and must rely on the accuracy of the information provided to them when reporting to CRAs as a component of the recovery process. Numerous courts have concluded that "a debt collector has the right to rely on information provided by the client-creditor, and has no obligation to undertake an independent debt validity investigation."[32]

Apart from the legal authority supporting this clarification, the Agencies should be aware that it is neither permitted by creditors nor administratively possible for third-party debt collectors to maintain all of the underlying records of a creditor that might potentially be

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1998); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383 (D.Del. 1991).

32 *Jenkins v. Union Corp.*, 999 F. Supp. 1120, 1140-41 (N.D. Ill. 1998). *See also Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459, 462 (M.D. La. 1996) ("debt collector should be able to rely on the representation and implied warranty from its client that the amount was due under either the lease or the law"); *Schmitt v. FMA Alliance*, 398 F.3d 995, 997 (8th Cir. 2005) (debt collector is not liable for actions taken in reliance on the creditor's provided information).

required to report an account. This impossibility is underscored by the Regulatory Definition Approach. That approach centers on a "conformity to fact" standard that would essentially require a debt collector to take possession of a creditor's transactional records with a consumer prior to reporting to a CRA. That is not feasible. It also is unnecessary because this information is available to the collector upon request. Indeed, this information is precisely what is routinely exchanged between creditors and collectors when consumers exercise their right to have a debt verified under the FDCPA or when consumers file disputes with CRAs and creditors (and now with data furnishers directly) under the FACT Act.

E. Accuracy Should Include Updating As Necessary.

The Agencies request comment on whether the definition of accuracy should include updating the information as necessary to ensure that the furnished information is current. ACA believes that accuracy should include updating for current status. This is normally done by furnishers under the Metro 2 Format. However, with the new furnisher rule, updating the information will require the banking agencies to evaluate whether financial institutions (creditors) that report updated information are required to retain the underlying origination documents until such time as the accounts are no longer reported, sold, or charged off to profit and lost. This is a function of the new requirement that the data furnisher's own records substantiate the reported information. As it stands, federal regulations requiring the retention of records by a financial institution impose a shorter retention period than the permissible

reporting period of an account. This means that creditors may continue reporting an account after the origination records no longer are available.

The Agencies have requested comment on whether the guidelines should incorporate a specific time period for retaining records in order to provide for meaningful investigations or disputes. There is no one-size-fits-all resolution to this question. For the reasons indicated herein, ACA believes that the guidelines should not specify a time period, but instead base the retention on the disposition of the underlying account. Thus, records should be maintained for as long as the accounts are reported or carried on the books of the financial institution/furnisher. If the accounts are sold before the end of the statutory-permissible reporting period, the underlying data should either be transmitted as part of the transaction, retained by the financial institution until such time as the accounts can no longer be reported, or otherwise made available to the asset purchaser.

In addition, in the context of asset sales, the data furnished in the consumer report should evidence a chain of title of the ownership and sale of the account. The reporting codes already exist to capture this information. The Metro 2 code "purchased from/sold to" historically has been reserved to memorialize transactions among creditors. ACA believes that all data furnishers should populate this field code to create a record accurately documenting the chain of title of consumers' accounts. This information should be available to all users, furnishers, and consumers so that all interested parties can trace the ownership of the account

and thereby minimize the risk of consumer confusion over the appearance of new tradelines with new creditors reflecting the sale and transfer of accounts.

F. Comments On Direct Disputes Proposed Regulations.

The FCRA and the FDCPA impose liability on data furnishers and debt collectors in connection with the receipt of a dispute directly from a consumer. Under the FDCPA and the FCRA, when a consumer disputes information that is part of a consumer report, a debt collector/data furnisher must notify the consumer reporting agency of the dispute.

Previously, a direct dispute from a consumer to a data furnisher did not trigger the duty to conduct a reinvestigation. Section 623(a)(8) of FCRA, as amended by the FACT Act, now permits consumers to dispute the accuracy of their reports in written communications directly with data furnishers. A direct dispute with a data furnisher triggers, among other things, a duty to reinvestigate under certain circumstances. This is a significant change from pre-FACTA law. The new dispute, reinvestigation, and other requirements of section 623(a)(8) have a significant impact on ACA members.

Before addressing the Agencies' requests for comments on direct disputes, ACA notes that the new investigation requirements of section 623(a)(8)(E)(iii) present a direct conflict with the FDCPA that should be addressed. There is a conflict between the FACT Act and the collection law requirements that arises when a data furnisher that is collection agency licensed to collect debts in a specific state receives a dispute from a consumer in another state. The

conflict arises because the FACT Act requires the data furnisher to complete an investigation and report the results to the consumer, but a collection agency that complies with the FACT Act and reports the results may be accused of violating state licensing laws by attempting to collect a debt in the state when it does so.

Virtually all States have specific laws regulating the out-of-state collection of debts. Most States have laws which make it a violation for an out-of-state collection agency to communicate with in-state debtors without a state license, state registration, and/or a posted bond if "doing business" in the state.

The conflict for debt collectors as a consequence of the intersection of the FACT Act direct dispute requirements and interstate collection laws poses serious liability. It is common for a consumer to reside in State A when he or she incurred a debt, and for the creditor to refer the debt to a licensed, registered, and bonded collection in State A. When the consumer moves to State B and registers a dispute with the collector in State A, the collector is required by the FACT Act to timely investigate and respond to the dispute. Because it is a collection account, the collector's responding letter to the consumer now residing in State B will include Federal and State mandated disclosures that the communication is from a debt collector attempting to collect a debt.[33]

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33 Section 807(11), 15 U.S.C. § 1692e(11), requires collectors to provide a "Mini-Miranda" to debtors in an initial written communication that "This is an attempt to collect a debt and any information obtained will be used for that purpose." State laws frequently modify the Mini-Miranda requirements by requiring the disclosure

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A furnisher that complies with section 623(a)(8) by investigating a dispute and reporting the results to the consumer might be alleged to have engaged in a "communication" or attempt to collect a debt.[34] ACA believes that the Agencies must address this conflict in the proposed direct dispute regulations by clarifying that compliance with section 623(a)(8) by communicating with an out-of-state debtor is not a "communication" or attempt to collect a debt in violation of State and/or Federal collection laws or, alternatively, by clarifying that the consumer's direct dispute is a limited waiver of the pre-existing cease communication request for purposes of responding to the consumer's inquiry.

The amended FCRA makes an exception in those cases where a consumer dispute is frivolous or irrelevant. Under the statute, it is a reasonable determination that a dispute is frivolous or irrelevant if (1) the consumer fails to provide sufficient information to investigate the disputed information; or (2) the consumer has previously submitted substantially the same dispute either directly to the data furnisher or indirectly through a CRA, and the data furnisher has already fulfilled their duties with respect to the dispute, i.e. conducted a reasonable

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in all communications and/or adding State-specific language. *See, e.g.,* Colo. Rev. Stat. §12-14-107(1)(1); Conn. Agencies Regs. § 36a-809-3(f); Ga. Comp. R. & Regs. r 120-1-14.23(b); Haw. Rev. Stat. § 443B-18(2); Iowa Code § 537.7103(4)(b); Me. Rev. Stat. Ann. tit. 32, § 11013(2)(K-1); N.C. Gen. Stat. § 58-70-110(2); Tex. Fin. Code Ann. § 392.304(a)(5); Vt. Code R. 104.04(b), (d); W. Va. Code § 46B-4-7(2); Wyo. R. & Regs. Ch. 4 §10(k).

34 The FDCPA defines "communications" broadly to include "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. §1692a(2).

investigation within the time frame permitted.[35] In addition, ACA agrees with the Agencies proposal that a data furnisher need to process a direct dispute where the furnisher is otherwise not required to investigate the dispute under the proposed regulation.

Once a data furnisher has made a reasonable determination that a dispute is frivolous or irrelevant, it must notify the consumer. The data furnisher must provide notice of the determination within five business days of making such determination, by mail, or (if authorized by the consumer) any other means available. Within the notice, a data furnisher is required to identify the reason(s) for the determination that a particular dispute is frivolous or irrelevant.

ACA believes that it is essential for the Agencies to require clear and conspicuous written communications of disputes from consumers to data furnishers in order to maximize accuracy of consumer reporting.[36] Unfortunately, more often than not, consumers who send written notices to data furnishers do not specify what they are disputing. For example, they may simply disclaim the account generally, or they may assert that they previously paid off the account, without specifying the allegedly inaccurate tradeline information that is disputed. For

35 The Agencies should reconcile the redundant obligations on data furnishers in situations where a consumer that submits a written dispute with a data furnisher at the same time he or she disputes with a consumer reporting agency. It is common for consumers to do this, and the result is that data furnishers have to respond to two separate information streams which unnecessarily increases the furnishers' time and costs.

36 ACA is studying options available to data furnishers and consumers to facilitate the efficient communication of written disputes by consumers and timely reporting of reinvestigation results by data furnishers.

that matter, consumers generally do not specify whether they are "disputing" a debt under the FACT Act, the FDCPA, and/or both, which can have significant consequences as noted below. For these reasons, the Agencies' regulations should require consumers to clearly and conspicuously inform the data furnisher in writing that they are disputing the accuracy of the information under the FCRA, including the information deemed inaccurate, and the basis for the alleged inaccuracy. For this reason, ACA strongly recommends that the Agencies implant the proposed § ___.43(d) to identify the specific contents of the notice of dispute that the consumer must include in order to trigger the investigation obligation.

The Agencies also should address certain inconsistencies between the FACT Act and the FDCPA (for debt collector data furnishers) in order to improve the accuracy of credit reporting, effectively record consumers' disputes, and avoid unnecessary litigation. As noted, *supra*, the FDCPA, as construed by the courts, requires data furnishers to accept consumer disputes whether communicated in writing or *orally* and report them to consumer reporting agencies.[37] In contrast, the FACT Act permits consumers to file only relevant, non-frivolous disputes directly with data furnishers in *writing* and only about alleged inaccurate information. The result of the broader applicability of the FDPCA dispute provisions is that data furnishers

37 *Brady v. Credit Recovery Co.*, 160 F3d 64 (1st Cir. 1998) (violation of the FDCPA by failing to include a consumer's oral dispute of the debt in the consumer's report furnished to consumer reporting agencies); *Young v. Credit Bureau Inc.*, 729 F. Supp. 1421 (W.D.N.Y. 1989) (FDCPA does not require that a consumer, in order to dispute the validity of a debt, convey that information in writing).

must accept all communications (oral and written) from consumers as "disputed" accounts when reporting to consumer reporting agencies, even though the consumers have not followed the proper dispute procedures under the FACT Act by providing a written communication with the collector.

Many consumers voice disputes orally in telephone communications with creditors and debt collectors. The Agencies request comment on whether a data furnisher should be permitted to communicate to consumers orally the address for direct disputes. ACA believes that orally communicating this information is consistent with the consumer's desire to quickly obtain (in a telephone call) the necessary information to begin processing direct dispute. It elevates form over substance to require the furnisher to only provide this information in writing and, as noted, many of the interactions with the consumer are oral.

Even more vexing a problem for the accuracy of the tradelines is that, when a dispute is irrelevant or frivolous for statutorily-prescribed reasons, the data furnisher will continue to report the account to the consumer reporting agencies as disputed so as not to violate section 807(8) of the FDPCA. Section 807(8) prohibits a debt collector from "communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."[38] It does not require the consumer to identify a reason for a dispute. The statute only requires the

38 Fair Debt Collection Practices Act, 15 U.S.C. § 1692e(8).

consumer to notify the collector of the dispute. There is no requirement that the dispute be "valid" for the statute to apply, contrary to the FACT Act which rules out frivolous and irrelevant disputes. In effect, if a consumer believes an account to be in dispute, it is in dispute under the FDCPA no matter what the debt collector does to verify it, even though it may not be a "dispute" under the FACT Act. Upon notice of the dispute from the consumer (again, either orally or in writing under the FDCPA), debt collectors are required to report the consumer's dispute to all consumer reporting agencies to which they previously reported the information.[39]

The result is that a frivolous, irrelevant, or unsubstantiated claim of inaccurate information on a tradeline will continue to be reported as disputed by the data furnisher in order to avoid litigation under the FDPCA. Obviously this outcome does not foster a process of increasing the accuracy of the information, and it also can affect the credit scoring and the availability of credit.

ACA strongly encourages the Agencies, when promulgating the final regulations implementing the direct dispute requirements, to evaluate ways to make the dispute process, procedures, and outcomes consistent under the FACT Act and the FDCPA. Failing to do so will only reinforce outcomes where consumers' tradelines will be reported as disputed regardless of the merits of the disputes, the result of the investigations into the disputes, or

39 *See Cass*, FTC Informal Staff Letter (Dec. 23, 1997).

whether consumers intend to dispute under the FDCPA, FACT Act, and/or both statutes.

VI. Conclusion.

ACA appreciates the opportunity to comment on the issues raised in the proposed rule. If you have any questions, please contact Andrew M. Beato at (202) 737-7777 or abeato@steinmitchell.com.

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Respectfully submitted,

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